IN THE

Supreme Court of the United States.

WILLIAM T. AYERS, Ex'r, etc.,
Appellant,

v.

THE CITY OF CHICAGO, et al.,
Appellees.

No. 856.

POINTS FOR APPELLANT ON MOTION TO DISMISS APPEAL.

MELVILLE W. FULLER,
Of Counsel for Appellant.

CHICAGO:
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1877.

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POINTS FOR APPELLANT ON MOTION TO DISMISS APPEAL.

May it please your Honors:

Upon the 8th day of April, A. D. 1875, this cause was removed by the order of the Superior Court of Cook county, upon the application of William T. Ayers, a citizen of Alabama, from that court into the Circuit Court of the United States, within and for the Northern District of Illinois.

Upon the 28th day of October, A. D. 1875, said United States Circuit Court entered an order remanding the cause to the Cook county Superior Court.

From this order, Mr. Ayers prayed an appeal to this court, which was allowed and perfected.

A motion to dismiss the appeal is now made, upon the ground that the order remanding the cause is not one

from which an appeal is allowed "by the statutes of the United States, or the practice of this court," and because the order was "not an order on the merits of the cause," nor "a final order, judgment or decree from which an appeal lies."

The latter ground is covered by the former. The order *is* a final order, so far as the United States Circuit Court is concerned, and *is* such final order as permits an appeal *if* the statutes provide for it. Nor in such case is it necessary that such an order should be upon the merits.

The only inquiry, is, then, whether the statutes of the United States provide for such appeal? Whether the Superior Court erred in the removal, or the United States Court in the remand, is not drawn in question on this motion; and, although the opinion of the Circuit Court upon the motion to remand is printed in connection with the motion to dismiss, I do not propose to be diverted from the true point of inquiry by the temptation thus offered to enter upon a discussion as to the correctness of the remanding order. The proper time for that, is when the appeal comes on to be heard.

The 5th section of the act of Congress, approved March 3d, 1875, and entitled "An act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from State courts and for other purposes," (*and under which statute this cause was removed*) reads as follows:

"That if, in any suit commenced in a Circuit Court, or removed from a State Court to a Circuit Court of the United States, it shall appear to the satisfaction of said

Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act; the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just, *but the order of said Circuit Court dismissing or remanding said cause to the State Court, shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be.*"

Public Laws, 2 Session, 43 Congress, Chap. 137, p. 470.

18 U. S. Stat. at Large, p. 472.

Here is an explicit provision for the prosecution of a writ of error or appeal from an order dismissing or remanding. This case is a case in equity, and therefore the review was to be sought by appeal, and not writ of error. It does not occur to me that any further suggestion is needed in opposition to a motion to dismiss, confessedly predicated upon the absence of any statute providing for an appeal.

The Circuit Court remanded the cause, because the learned presiding judge was of the opinion that the controversy involved was not such, so far as Ayres was concerned, as to give him the right of removal. Mr. Ayres appealed from the remanding order to this court, for the

purpose of testing the correctness of the conclusions arrived at. This the statute expressly authorized him to do, and he will be prepared, through his counsel, to submit his reasons for complaining of the remanding order as erroneous, when the case is reached for argument. But on this motion the only question is, was the appeal provided for? And that question the statute answers in the affirmative.

Respectfully submitted,

MELVILLE W. FULLER,

Of Counsel for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, A. D. 1879.

W. T. AYERS, Executor, &c., *Appellant,*

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THE CITY OF CHICAGO, et als., *Appellees.*

BRIEF FOR APPELLANT.

MELVILLE W. FULLER,

For Appellant.

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MAY IT PLEASE THE COURT:

THE FACTS

lie in a brief compass, and are as follows:

October 20th, 1874, the City of Chicago filed its bill in the Superior Court of Cook County, against George Taylor, David A. Gage and Eliza M. Gage, setting up that Gage was indebted to the city in the sum of $507,704, and that he and his wife executed and delivered a certain conveyance to Taylor, in trust for the security of the indebtedness, with power of sale, and that the time for the execution of said power had arrived, but Taylor refused to sell, and prayed that Taylor be decreed to proceed so to do.

Gage and wife answered the bill, by counsel, admitting the deed, but generally denying any indebtedness.

Taylor answered, setting up that he was unwilling to take the responsibility of selling, until the amount of indebtedness was fixed, which it was not by the deed of trust.

April 8, 1875, William T. Ayres, executor, &c., a citizen and resident of Alabama, applied to the Superior Court for leave to be made a party defendant, and this being done, the parties appearing and no objection being made, filed his answer, setting up that he was a judgment creditor of David A. Gage, having recovered judgment against him, in the United States Circuit Court for the Northern District of Illinois; that he is entitled to collect his judgment out of the land named in the trust deed, and insisting for reasons given, that the deed is invalid and if not, that the amount for which the land was held under that conveyance was so moderate as to leave a sufficient surplus to pay him in full, and offering to pay said indebtedness.

He also asked leave, which was granted, no objection being made, to file a cross-bill, and filed the same accordingly. In this pleading he sets up the recovery of his judgment, &c.; sets forth fully the circumstances attending the giving of the trust deed to Taylor; alleges the deed to have been given under duress and without consideration, and that the land is worth $350,000, and that there is due to the city but $166,874.51, which, if the deed be held valid, he offers to pay, if he can be subrogated to the rights of the city, in that and certain other property which the city holds, &c. He also alleges, *in substance, that Gage is not defending in good faith*, and ail his property will be sacrificed, and complainant rendered unable to collect his judgment, if Taylor be ordered to proceed.

Upon the same day, April 8, 1875, Ayres filed his petition, for the *removal* of the cause, to the United States Circuit Court for the Northern District of Illinois, averring that he

is one of the defendants in the original bill; that the matter in dispute in the original bill, exclusive of costs, exceeds the sum of $500; that in the original bill there is a controversy which is wholly between the said complainant and the petitioner, and which can be fully determined as between them.

That he is complainant in the cross-bill, and a citizen of Alabama, and all the other defendants are citizens of Illinois, and the matter in dispute, exclusive of costs, exceeds the value of $500, and that the controversy therein is wholly between citizens of different States, &c. Prays that the original bill and cross-bill may *each be removed, &c.*

The parties appearing, and bond being given, and no objection made, the Superior Court transferred the cause to the United States Court. (P. Rec., p. 29.)

The transcript, &c., were filed in the United States Circuit Court, May 1, 1875. (P. Rec., p. 1.)

June 23, 1875, "*the defendant in the cross-bill, the City of "Chicago,*" moved that the cause be remanded.

June 29th, motion heard, and taken under advisement.

October 28, 1875, cause remanded, and Ayers, executor, &c., appealed, which is this case.

Assignment of Error.

The Court erred in remanding the cause to the Superior Court.

ARGUMENT FOR APPELLANT.

The opinion of the learned Judge, upon remanding the cause, will be found in 6 Bissell, 467, under the title of *City of Chicago* v. *Gage*, and it appears therefrom that the conclusion of the court was founded upon the assumption that the controversy in the case was as to whether Gage owed the city or not anything which should be paid out of the property in the trust deed.

It is respectfully submitted that this is a partial and incorrect view of the *actual* controversy.

The original bill was filed by the city, *not* for the purpose of ascertaining the alleged indebtedness, but for the purpose of *compelling Taylor to proceed to sell.*

It is true that the prayer, (Record, 5), is also that the amount of indebtedness may be fixed, but this is merely ancillary, and is not the object of the bill. Taylor answers professing to be willing to sell, but he wishes the indebtedness fixed in the first place. Gage answers, denying the indebtedness in general terms, but admitting the execution of the deed—so that there is no controversy between the city and Gage and Taylor as to the deed.

But Mr. Ayers takes, in his answer and cross-bill, two positions:

1. That the trust deed is wholly without consideration, and void. (*a.*) Because obtained of Gage under duress. (*b.*) Because the alleged indebtedness represents money which Gage loaned as treasurer of the city, upon an agreement with the city to that end, in order that the city might make a profit thereon, which agreement the city had lawful power to make, and the existence of which it is estopped from denying, and that the securities taken for

said loans (not the property in question here), belong to the city, and constitute a full satisfaction of any claim on its part.

And as to the controversy on this point, Ayers avers (P. Rec., p. 25) that Gage "*admits* in his defense the "execution of said trust deed, and simply claims there is "nothing due upon it, and neglects and declines to make "any other defense in that action."

And also that the property in the trust deed is worth over $300,000, the indebtedness is not as much as $167,000 (p. 26), and "that said defendant, D. A. Gage, as your "orator is informed and believes, has offered to give said "city a deed of the same to any person to whom the city "might sell, upon receiving a receipt of acquittance in full, "which your orator charges he ought not to be permitted "to do." (P. Rec., p. 24.)

When the learned judge of the circuit court says (6 Bissell p. 473): "If it had been made to appear that "Gage had given the trust deed to Taylor for the purpose "of defrauding Ayers, or that the conveyance was *not* "*bona fide*, the parties to the controversy might be changed, "or any creditor of Gage might be *the real party to the* "*controversy* as to the city and trustees, but there is noth- "ing of the kind in this case;" it is respectfully submitted the position of Ayers that the deed is invalid, has entirely escaped his notice.

It is to be remembered also, that Ayers sets up that not only all the assets of Gage taken as security for loans, which Ayers insists belong to the city, were transferred by the Taylor deed, but also substantially all of said David A. Gage's private property, and that he "can find "no other property of said Gage other than that de- "scribed in said trust deed out of which to collect his said "judgment."

Here then is a controversy *wholly between* Ayers on one side and the city, Gage and Taylor, on the other, and the case falls within the provisions of the act of 1875, providing for the removal of causes.

The second section of which is as follows :

"That any suit of a civil nature at law or in equity now "pending or hereafter brought in any State court, where "the matter in dispute exceeds, exclusive of costs, the sum "or value of five hundred dollars, and arising under the "Constitution or laws of the United States, or treaties "made, or which shall be made, under their authority, or "in which the United States shall be plaintiff or petitioner, "or in which there shall be a *controversy between citizens of* "*different States*, or a controversy between citizens of the "same State claiming lands under grants of different "States, or a controversy between citizens of a State and "foreign States, citizen or subject, either party may re-"move said suit into the Circuit Court of the United States "for the proper district; and when in any suit mentioned in "this section there shall be a controversy *which is wholly* "*between citizens of different States, and which can be fully* "*determined as between them*, then either one or more of "the plaintiffs or defendants, actually interested in such "controversy, may remove said suit to the Circuit Court "of the United States for the proper district."

19 U. S. Stat. at Large, 470.

2. Ayers' second position is, that if the deed be valid, then there is due upon it only $166,874.51, and this he offers to pay upon subrogation to the securities and property held. (P. Rec., p. 26.)

It seems to me that as to this, the controversy is really wholly between Ayres and the city. Taylor wishes the indebtedness to be ascertained, but he neither knows nor cares anything about how this is done, or what the amount

is that is so fixed. Gage answers, in general terms, that there is no indebtedness; but Ayers alleges that Gage is willing to part with the entire property *if he can get an acquittance from the city in full.* The original bill is not filed at all with the view of having the indebtedness determined upon, nor for the purpose of having the deed foreclosed. The bill is directed to the attainment, as its object, of a decree compelling Taylor to proceed.

Now, as Ayers is a citizen of Alabama, and has the right under the constitution to litigate in the United States Courts, it is rather oppressive upon him to turn him over to the State Court, notwithstanding Gage and Taylor and the city substantially agree.

His proceeding is really an effort to collect his judgment, which he recovered not in a State Court, but the Federal Court. He cannot file a creditor's bill in the Federal Court, and enjoin the parties in the State Court. As a matter of fact, he tried that in this instance, and the court refused the injunction. He pursued the only course open to him, and that was to intervene in the State Court and then remove the cause.

Under the 5th Section of the act, " If, in any suit * * " removed from a State Court to a Circuit Court of the " United States, it shall appear to the satisfaction of said " Circuit Court, at any time after such suit has been * " removed thereto, that such suit does not *really and sub-* " *stantially* involve *a* dispute or controversy properly within " the jurisdiction of said Circuit Court, * * the said " Circuit Court shall proceed no further therein, * * " but shall remand it to the court from which it was re- " moved, &c."

What is the test? It is whether there is *one real and substantial* controversy between citizens of different States. The correctness of the action of the Circuit Court in this case depends upon what can be gathered from the petition

for removal and the record of the cause removed. The petition is correct in form, and an examination of the pleadings shows that not only one, but the *real* controversy is between Ayres and the City. Taylor is confessedly a mere "passenger," and Gage is shown upon the record not to occupy the position of a *bona fide* adversary. It is Ayers who *alone contests the validity of the deed*, and it is Ayres who really makes the only actual contest as to the amount of the indebtedness.

Causes are to be remanded when it appears that the controversy is not properly within the jurisdiction of the Federal Court, and not otherwise.

If facts are stated which are not true, as for example in regard to citizenship or value, issue may be taken thereon by a plea in the nature of a plea in abatement.

If, "at any time" after the removal, the non-federal character of the case shall appear, the circuit court may remand, and may make such order as to costs as shall be just.

It is difficult to perceive that injustice can be done by retaining a cause until it actually appears to have been improvidently removed, while great injustice might be the result of an order remanding upon a mistaken view of the pleadings.

In the case at bar, Mr. Ayres insisted that he is the only real contestant in the premises. This is certainly so if Gage does not contest in good faith.

Mr. Ayers' answer and cross-bill are to be taken together. His answer in fact refers to the cross-bill, and asks that so far as applicable it may be taken as part of his answer.

Now, neither the City nor Gage has answered the cross-bill. The allegations stand admitted, as if the motion to remand were a demurrer. The cross-bill avers that Gage

admits the validity of the deed, which Ayers denies, and as to the indebtedness, is willing for an acquittance from the City, to let the property go, notwithstanding, as Ayres avers, it is amply sufficient to pay his judgment and the City besides. It is plain upon the face of these pleadings that Gage is not defending in good faith, and that not only a controversy but the *only* controversy is between Ayres and the City.

Hence, the order of the Court below remanding the cause should be reversed.

Respectfully submitted.

MELVILLE W. FULLER,
For Appellant.

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Appellees.

Additional Suggestions on Appellant's behalf.

MAY IT PLEASE YOUR HONORS:

In the brief, already submitted for appellant, a suggestion of considerable importance escaped me.

It is this—Ayers' cross-bill is to all intents and purposes, a *creditor's bill* based upon a judgment upon which execution was issued and returned *nulla bona*.

But as Ayers recovered his judgment in the United States Court, he could *not* sustain his creditor's bill in a State Court.

In *Steere* v. *Hoagland*, 39 Illinois, 266, the court say: "It is also insisted that the judgments in the Circuit Court "of the United States are not such as will authorize a "creditor's bill to be exhibited in the State courts. That "being the adjudication of a court of another jurisdiction, "our courts will not recognize such proceedings as the "basis upon which to act, and to afford relief. It has been "held that a creditor's bill will not lie in the courts of one

" State, to enforce a judgment recovered in another State. " And in the case of *Tarbell* v. *Griggs*, 3 Paige, 207, it " was held that a recovery of judgment in the United " States Circuit Court, with a return of execution, will " not sustain a creditor's bill."

The Superior Court of Cook County permitted the cross-bill to be filed, but if the city had demurred upon the ground indicated, the demurrer would have been sustained. By the removal, the United States Court obtained, not appellate, but original jurisdiction, and the demurrer, on that ground, would have been overruled. And the removal of the controversy between him and the other defendants, (a controversy between citizens of different States) removed the whole cause, and enabled Ayers to obtain relief which, in the State Court would have been denied him.

In the *Farmers' Loan and Trust Company* v. *The Chicago, P. & S. W. Co.*, Judge DRUMMOND has just ruled (Oct. 28, 1879) that " it was not necessary that the main " controversy should be one on which a removal was asked. " The statutes did not say that. The courts had decided " that way in some instances, but it was not the language " of the statutes. The statutes only required that there " should be *a* controversy, and if that was complied with, " a case could be removed anyway; and if the controversy " was one in a case which could be removed, that was " sufficient."

I have already pointed out that in the case at bar, there was not only *a* controversy between citizens of Illinois on the one hand, and a citizen of Alabama on the other, but that this was the *only* real controversy in the case.

It seems to me that the fact that Ayers' bill would lie only in the Federal Court, is a strong argument to sustain the removal, because the controversy as to him can be

heard and determined in no other tribunal. At the same time, he would have taken nothing by filing his creditor's bill in the Federal Court in the first instance. That court would not have enjoined the proceedings in the State Court, nor attempted to control them.

There was no contest over the validity of the deed, and practically none over the amount of the indebtedness, in the State Court, and the original bill sought only to compel the trustee to proceed to sell, and to sell *without redemption.*

So that Ayers would have lost all remedy if he had not taken the course he did.

It was not simply his right, under the constitution, to litigate in the Federal Courts, but he could litigate *nowhere else.*

Respectfully submitted.

MELVILLE W. FULLER,

Of Counsel for Appellant.

Docket No...... *Agenda No.*.....

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Of Counsel for Appellant.

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BRIEF AND ARGUMENT FOR APPELLEE.

W. C. GOUDY,

For Appellee.

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BRIEF AND ARGUMENT FOR APPELLEE.

MAY IT PLEASE THE COURT:

The record shows, that October 20th, 1874, the City of Chicago filed its bill in the Superior Court of Cook County, against George Taylor, David A. Gage and Eliza M. Gage, setting up that Gage was indebted to the city in the sum of $507,704, and that he and his wife executed and delivered a certain conveyance to Taylor, in trust for the security of the indebtedness, with power of sale, and that the time for the execution of said power had arrived, but Taylor refused to sell, and prayed that Taylor be decreed to proceed so to do.

Gage answered the bill, admitting the deed, but generally denying the indebtedness.

The court below subsequently re-affirmed the decision in this case, in

Canaher v. *Brennan*, 7 Biss., 497.

In support of the views of the appellee, we cite the following cases:

In re Frazier, United States Circuit Court, Eastern District of Michigan, by Justice Swayne, reported in 7 Central Law Journal, p. 227.

Donahoe v. *The Mariposa Land Mining Company*, 1 Pacific Coast Law Journal, 211, Opinion by SAWYER, J.

Ex parte Grimball, Supreme Court of Alabama, Vol. 8 Central Law Journal, 151.

Howlan t Coal Co. v. *Brown*, 13 Bush, (Ky.,) 681.

Now it is plain from the record, that the controversy between the appellant and appellee cannot be determined without the presence of the defendant, Gage. Whatever decree would be entered must necessarily affect Gage, and ascertain his indebtedness, and decree a sale of his property. This seems too plain for argument, and the case should therefore be affirmed.

Respectfully submitted.

W. C. GOUDY,
For Appellee.